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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 700

JAMES RYAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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JAMES RYAN,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, James Ryan, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, entered in the above entitled cause on November 27, 1951, affirming a judgment of imprisonment in a contempt matter wherein a petition for rehearing was denied on January 21, 1952, and a dissenting opinion rendered.

OPINIONS BELOW.

The judgment of the Criminal Court of Cook County, Illinois, (R. 17-19) is not reported. The opinion of the Supreme Court of Illinois (R. 7-16) is reported in 410 Ill. 486, and the dissenting opinion (R. 16-17) is reported in 410 Ill. 486, commencing at page 500.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257, sub-section (3), wherein jurisdiction is conferred to review by Certiorari the final judgments of the highest courts of States, in causes wherein rights, privileges or immunities are specifically set up or claimed under the Constitution of the United States.

The Federal questions were presented in the respective State courts:

(1) In the Criminal Court of Cook County, in the Answer of James Ryan to the Rule to Show Cause (R. 7, 13-14, 14, 16, 17-19), invoking the protection of,

Constitution of Illinois, Art. II, Secs. 2, 6, and 10.
Constitution of the United States, 4th and 5th Amendments, Sec. 1 of 14th Amendment.

(2) In the Supreme Court of Illinois, in the Brief and Argument of Plaintiff in Error (certified separately) (pp. 20, 59-61) complaining of the violations by the trial court of,

Constitution of Illinois, Art. II, Secs. 2, 6 and 10.
Constitution of the United States, 4th and 5th Amendments, Sec. 1 of 14th Amendment.

(3) In the Supreme Court of Illinois, in the petition for rehearing (R. 42-43, 68), pointing out facts ignored, and misstated, in the opinion, and complaining of the violations of,

Constitution of Illinois, Art. II, Sec. 2.
Constitution of the United States, 5th Amendment, Sec. 1 of 14th Amendment.

The contentions of petitioner were overruled wherever presented, and the petition for rehearing was denied without comment (R. 68).

THE QUESTIONS PRESENTED ARE:

1. Was the petitioner deprived of his constitutional rights under the due process clause of Section 1 of the Fourteenth Amendment by the refusal of the State court of review to consider, pass upon or even mention basic undisputed questions of fact in the record of a contempt matter, wherein defendant was sentenced to imprisonment, which refusal resulted in the withholding from his protection the applicable constitutional guaranties, statutory provisions, and established principles of law which require his discharge?

And further, was due process violated by said State court in distorting and misstating other material undisputed facts in the record, with like results?

2. Is petitioner deprived of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment, when sentenced by the State court under a judgment for contempt in failing to produce books and records demanded by a grand jury subpoena, where such subpoena,

(a) Contains in the *duces tecum* clause a "catch-all" provision held by this Court to invalidate the subpoena;

(b) Contains an *ad testificandum* clause forbidden by the State Constitution and State statute;

(c) Is so broad in scope as to violate the State Constitution and the established law.

(d) Where the State court of review disposed of the complaints by holding the invalid portions to be mere surplusage;

(e) And where no order of court was entered directing the issuance of a subpoena against such person.

3. Is petitioner deprived of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment, when the state court of review affirms a judgment sentencing him for contempt in failing to produce before the grand jury under a subpoena *duces tecum* the alleged books and records of a corporation, which would prove his guilt of criminal charges then pending against him before said grand jury, where it appears without contradiction:

(a) That the corporation was not served with the subpoena;

(b) That no officer or agent of the corporation was served as such;

(c) That the witness was served only as an individual;

(d) That the subpoena contained both an *ad testificandum* clause and a *duces tecum* clause;

(e) That such witness was charged on the grand jury docket with violations of the criminal laws;

(f) That such witness was not at the time, and never had been, an officer, director, official, nor a member of the corporation;

(g) That such person has the sole and exclusive possession of the records and books demanded by the subpoena, and that no other person has access to, or knowledge as to the location of said books and records.

And shall the doctrine of the *Wilson* case (221 U. S. 361) be extended to include such situations; or shall the doctrine of the *White* case (322 U. S. 694) apply, that books held in a purely personal capacity need not be produced.

4. Is the due process clause of Section 1 of the Fourteenth Amendment violated by a State in having a sub-

poena *duces tecum* served upon an individual perform the function of a search warrant, when a search warrant under the same set of facts and circumstances would be unconstitutional.

STATEMENT (Condensed).

(For detailed Statement see Appendix B, page 3a).

July 14, 1950, in a matter entitled *People of the State of Illinois* v. *James Ryan,* known as Grand Jury Docket No. 96, petitioner was charged upon the docket of the Cook County, Illinois, grand jury with violations of two specified sections of the Criminal Code (R. 9, 15).

A statute of Illinois prohibits the calling of any person charged with crime as a witness in any criminal proceedings except at his own request (Ill. Rev. Stat. (1951), Chap. 38, Par. 734).

Petitioner did not request that he be called as a witness in said matter.

July 19, 1950, the State's Attorney presented to the Chief Justice of the Criminal Court a petition for an order authorizing the issuance of a grand jury subpoena (*ad testificandum* and *duces tecum*) in said Grand Jury Docket No. 96, directed to Tam O'Shanter Country Club, a corporation, and Wilfred A. Weismann, Secretary, but entitling the petition as *People of the State of Illinois* v. *George S. May* (R. 1-2).

On the same day an order was entered for the issuance of a subpoena as described in said petition (R. 3).

July 27, 1950, there was filed in the Clerk's Office of said Criminal Court a printed and typewritten grand jury subpoena bearing date July 19, 1950, issued in Grand Jury Docket No. 96, directed to Tam O'Shanter Country

Club and Wilfred A. Weismann, Secretary, with the name of James Ryan written thereon in longhand, and returned as having been served only on James Ryan as an individual (R. 4).

Said subpoena contained both an *ad testificandum* clause and a *duces tecum* clause (R. 4).

Said subpoena stated that it was issued in Grand Jury Docket No. 96, and was entitled *People of the State of Illinois* v. *George S. May,* and commanded James Ryan to appear forthwith before said grand jury to testify, and to bring with him certain specified documents and records, concerning "a certain complaint before said grand jury against George S. May," (R. 4), concealing the fact that in said Grand Jury Docket No. 96, James Ryan was also charged with crime and that by said subpoena he was commanded to testify and to produce documentary evidence against himself.

Said subpoena was not served upon Tam O'Shanter Country Club, a corporation, nor upon Wilfred A. Weismann, either as secretary or otherwise, nor upon any officer or agent of said corporation as such, but only upon James Ryan individually (R. 4).

Said subpoena was so broad in scope that it commanded the production of practically all the records of Tam O'Shanter Country Club, a corporation (R. 2, 4, 12-13).

Said subpoena also contained a "catch-all" provision similar to the one held invalid in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 221 (1951) (R. 4, 13).

July 27, 1950, an order was entered in the Criminal Court for the attachment of James Ryan (R. 5), and he was arrested under the writ and his body brought into court August 1, 1950 (R. 6), and on August 2, 1950, he was taken by the sheriff before the grand jury.

August 3, 1950, on a verified petition of the Foreman of the Grand Jury, a Rule was entered in the Criminal Court upon James Ryan to show cause why he should not be punished for contempt of court in failing to obey the subpoena (R. 10-11).

August 21, 1950, James Ryan filed his sworn answer to the Rule in which he set forth the above facts, alleged the invalidity of all the proceedings and the subpoena, as being violative of his rights as guaranteed by the Constitution of Illinois, Sec. 6 of Art. II, and asserting that to compel him to testify, and to produce said books and records as demanded would deprive him of liberty and property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 2 of Article II, of the Constitution of Illinois (R. 13-14, 15-16).

He further stated in said verified answer that he was not then, and never had been, a member, an officer, director or official of Tam O'Shanter Country Club, a corporation; but that he has the sole and exclusive possession of the records and books demanded and specified in said subpoena, and that no other person has access to or knowledge as to the location of said records and books; that said books and records contain entries made by respondent in his own handwriting, and if produced would tend to incriminate him (R. 15-16).

In the answer he further stated that on July 24, 1950, by resolution of the Board of Directors of Tam O'Shanter Country Club, a corporation, he was appointed attorney in fact for said corporation to execute such petitions, answers, motions, affidavits, notices or other documents as may be desirable or necessary to fully and effectually preserve, protect and enforce the rights of said corpora-

tion as guaranteed by the State and Federal constitutions (R. 13), and a certified copy of said resolution is attached to the answer (R. 16-17).

August 25, 1950, an order and judgment was entered in the Criminal Court of Cook County, finding James Ryan guilty of contempt, and sentencing him to the county jail until he shall produce before the July Term 1950 Grand Jury for Cook County, Illinois, the books and records as specified in said subpoena (R. 17, 18, 19).

On writ of error to the Supreme Court of Illinois, that court affirmed the judgment, ignoring, and not even mentioning the fact that James Ryan was a named defendant in said Grand Jury Docket No. 96, charged with crime, disregarding the fact that the subpoena was never served upon the corporation, Tam O'Shanter Country Club, nor upon any officer or agent of said corporation as such; misstating contrary to the record, that James Ryan in his answer admitted that he was the agent of said corporation and in that capacity had the possession of said books and records; holding that the "catch-all" phrase, and other provisions of said subpoena that were bad were mere surplusage not invalidating the remaining parts of the subpoena (R. 39, 22-32).

Mr. Justice Crampton rendered a dissenting opinion, pointing out some of the omissions and misstatements in the opinion of the court (R. 32-38).

A petition for rehearing was filed in the Supreme Court of Illinois, in which many of the omissions and misstatements were specifically pointed out, and complaining that the law applicable to the facts in the record was disregarded, resulting in erroneous conclusions (R. 40-67), and contending that the omissions, misstatements and erroneous conclusions rendered the judgment of the Criminal

Court, and its affirmance, a violation of the due process clauses of Article II, Section 2, of the Constitution of Illinois, and the Fifth Amendment, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 40-67).

The petition for rehearing was denied January 21, 1952 (R. 68).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Illinois erred:

1. In ignoring, and thereby failing to consider, or mention, the basic undisputed fact in the record, that James Ryan was a named defendant in a specific criminal charge placed against him upon the docket of the July, 1950, grand jury before any subpoenas were issued in said matter.

2. In failing to hold, that under the common law a defendant charged with crime was an incompetent witness in said matter, and could not be called to produce evidence therein.

3. In denying to petitioner the protection of Paragraph 734 of the Criminal Code of Illinois, which declared that where a person is charged with crime the court and grand jury are prohibited from calling him as a witness in said matter, except at his own request.

4. In failing to hold that James Ryan did not request that he be made a witness in said grand jury proceedings.

5. In denying to petitioner the constitutional and statutory protection, that a person charged with crime upon the docket of a grand jury cannot be compelled by subpoena to produce evidence against himself.

6. In denying to petitioner the protection of the doctrine, that the issuance of a grand jury subpoena to a

person charged with crime upon the docket of said grand jury, commanding him to testify and to produce evidence in said matter, and the service of such subpoena, are in violation of the constitutional and statutory rights of such person, and violate the due process clause of Article II, Section 2, of the Constitution of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. In affirming the judgment of the Criminal Court of Cook County, adjudging petitioner guilty of contempt of court and sentencing him to imprisonment, for his failure and refusal to produce evidence before the grand jury in a matter wherein he is charged with specific crimes, and thus depriving him of liberty without due process of law, in violation of his constitutional rights as guaranteed by Article II, Section 2, of the Constitution of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. In holding that the "catch-all" provision in the *duces tecum* clause of a grand jury subpoena is mere surplusage, leaving the remainder valid and enforceable.

9. In holding that in a grand jury subpoena *duces tecum,* a demand in general terms for all, or even a substantial part, of the records, does not invalidate the subpoena.

10. In holding that no application under oath, and no order of court, is necessary for the issuance of a grand jury subpoena *duces tecum* against an individual.

11. In holding that a grand jury subpoena containing an *ad testificandum* clause, which is forbidden by the State Constitution and State Statute, does not result in total invalidity of a subpoena which also contains a *duces tecum* clause.

12. In holding that a grand jury subpoena containing a *duces tecum* clause, though invalid in part, is enforceable as to the remainder.

13. In holding that a witness served with a grand jury subpoena invalid in part, must cull the good from the bad, and may be punished for contempt of court in disobeying the remaining portion thereof.

14. In holding that a witness served with a forthwith grand jury subpoena containing an *ad testificandum* clause and a *duces tecum* clause, which is invalid in whole or in part, must appear before the court which issued it and move that it be quashed, vacated, or amended, otherwise he may be punished for failure to obey the subpoena.

15. In holding that petitioner has possession of the books and records demanded by the subpoena as an agent of the corporation, Tam O'Shanter Country Club.

16. In failing and refusing to hold that petitioner was served with the subpoena only as an individual.

17. In misstating the facts contained in the answer of petitioner to the rule to show cause, as to his relation to the corporation.

18. In holding that the facts in the case are similar to the facts in the case of *Wilson* v. *United States,* 221 U. S. 361.

19. In failing and refusing to hold that the books and records demanded by the subpoena were held by petitioner in a purely personal capacity.

REASONS FOR GRANTING THE WRIT.

I.

The Supreme Court of Illinois, in reviewing the judgment in the instant case, ignored and refused to consider the undisputed basic fact in the record that placed the petitioner under the protection of the Constitution of Illinois, the Statute of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The basic undisputed fact thus ignored and not mentioned or considered is:

On July 14, 1950, the matter of *People of the State of Illinois* v. *James Ryan* on charges of keeping gambling devices in violation of Sections 341 and 343 of the Criminal Code of Illinois, was placed upon the docket of said grand jury and became known as Grand Jury Docket Number 96 (R. 9, 15).

Petitioner being so charged with crime, was placed under the protection of the constitutional guaranty against self-incrimination (Constitution of Illinois, Art. II, Sec. 10). Paragraph 734 of the Criminal Code of Illinois prohibited his being called as a witness except at his own request, and he never made such request.

The Supreme Court of Illinois, by ignoring said fact, denied to petitioner the protection of the Constitution and Statute, and deprived him of his liberty without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

As the defendant in the case of *In re Oliver,* 333 U. S. 257, decided in 1947, was sent back to jail by the Supreme Court of Michigan without that court ever having seen a record of the proceedings, and without knowing all that

took place at the trial, so the Supreme Court of Illinois, although the record was before it, affirmed the judgment without ever having mentioned or considered the basic fact therein.

The failure to consider the entire record is held in the *Oliver* case as violative of due process of law.

The question presented is of importance, because the decision of the Supreme Court of Illinois results in the promulgation of a principle of law that a reviewing court may disregard undisputed basic facts presented and repeatedly urged.

In the vigorous dissent of Mr. Justice Crampton, the omission is called to the attention of the majority that, "It should be borne in mind that Ryan, himself, was under investigation by this grand jury before the first subpoena was issued." (R. 36); and said dissent closes with the statement that, "The present decision gives the sanction of this court to methods which we have condemned in the past, and which I regard as still offensive to our fundamental conceptions of justice." (R. 38).

The omission of the Supreme Court of Illinois to mention in its opinion the undisputed basic fact in the record, is tantamount to a concealment thereof, resulting in the denial of a public hearing, held in the *Oliver* case to be violative of due process of law.

II.

The decision of the State Supreme Court in the instant case inaugurates a method of procedure for the issuance of a subpoena *duces tecum* compelling the production of incriminating documents and effects by a person charged with crime before a grand jury, without the necessity of an application upon oath or affirmation, and without an

order of court, for the issuance of the subpoena, as required by the Constitution for the issuance of a search warrant.

In the instant case there was no petition or application filed, and no order entered, for the issuance of a subpoena *duces tecum* directed to James Ryan, the petitioner, commanding him to produce before the grand jury documentary evidence.

The decision is directly in conflict with the previous decisions of the Supreme Court of Illinois and this court wherein it has been held consistently that a subpoena *duces tecum* is equivalent to a warrant of search and seizure.

Section 6 of Article II of the Constitution of Illinois is in substantially the same language as the Fourth Amendment to the Constitution of the United States, in that both prohibit the issuance of a search and seizure warrant, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized. (Sec. 6 of Art. II of the Constitution of Illinois; Fourth Amendment to the Constitution of the United States; *People* v. *Brocamp,* 307 Ill. 448, 452-453 (1923)), and should receive the same construction, *People* v. *Reynolds,* 350 Ill. 11, 16 (1932).

Section 10 of Article II of the Constitution of Illinois, in providing that no person shall be compelled in any criminal case to give evidence against himself, is similar to the Fifth Amendment to the Constitution of the United States. (Sec. 10, Art. II of the Constitution of Illinois; Fifth Amendment to the Constitution of the United States; *People* v. *Brocamp,* 307 Ill. 448, 453; and should also receive the same construction.

It was held in *Hale* v. *Henkel,* 201 U. S. 43, 76, 77 (1905), and also in *People* v. *Reynolds,* 350 Ill. 11, 18 (1932), that

in wrongfully obtaining incriminating evidence, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum,* against which the person is entitled to protection. In *Boyd* v. *United States,* 116 U. S. 616, 622 (1886), it was held that a compulsory production of a man's private papers to establish a criminal charge against him, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; and on page 633 it was held that compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, is an unreasonable search and seizure condemned by the Fourth Amendment.

While in the case of *Wilson* v. *United States,* 221 U. S. 361 (1910), and other cases applying the same doctrine, it was held that the constitutional protection against self-incrimination applied only to the "private papers or effects" of the witness; yet subsequently the protection has been broadened, and in the case of *United States* v. *White,* 322 U. S. 694, decided in 1943, it was held (page 699), that the privilege protects not only the private property of the person claiming the privilege, but those papers and effects in his possession in a purely personal capacity. And in *People* v. *Grod,* 385 Ill. 584, decided in 1944, it was held that the protection of the constitutional guaranty against unreasonable search and seizure extended to a person where United States bonds registered in the name of a third party, and claimed to have been stolen, were found in his home, and he was not required to allege they were his property.

The question presented is of importance in the administration of the criminal laws of the various States, because in nearly every State of the Union the constitutional pro-

visions against unreasonable search and seizure, and against self-incrimination, are alike. Almost daily a person under investigation by a State grand jury is commanded by a subpoena to appear and testify before such grand jury, and to bring with him designated books, records, documents, papers and effects.

It is in the public interest to have the question settled, whether a subpoena *duces tecum* in a criminal case is required to be supported by an order of court issued upon an application under oath or affirmation, or if it may be issued promiscuously, and without restriction.

Petitioner contends that the decision of the Supreme Court of Illinois is erroneous in failing and refusing to hold that the subpoena as to its *duces tecum* clause must have applied to it the same constitutional provisions and the same laws as a search warrant against an individual.

III.

The decision of the Supreme Court of Illinois in the instant case extends the doctrine of *Wilson* v. *United States,* 221 U. S. 361 (1910), to undisputed facts which are not only dissimilar, but contrary, to the facts of the *Wilson* case, and thereby deprives the petitioner of his liberty in violation of the Constitution of Illinois, and the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Supreme Court of Illinois states that the instant case is ruled by the doctrine of *Wilson* v. *United States,* 221 U. S. 361 (1910), whereas the facts in the instant case are entirely dissimilar. It is contended by petitioner that the doctrine stated in the case of *United States* v. *White,* 322 U. S. 694 (1943), should control.

In both of said cases it is announced that corporate documents and records held by the witness as an officer of the corporation, where such corporation has been served with the subpoena, are not within the protection of the constitutional guaranty against self-incrimination.

In the *Wilson* case (p. 380), and many other cases following, it is held that the protection of the constitution applies only to the private papers of the witness but that the question still remains with respect to the nature of the documents and the *capacity* in which they are held. In the *White* case the protection of the Constitution has been broadened (p. 699) to include papers and effects which are "the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity."

The difference in the facts of the *Wilson* case and the undisputed facts in the instant case may be summarized as follows:

Wilson case	*Instant case*
The corporation was served.	Corporation not served.
Officers served as such.	No officer served as such.
Wilson not served as an individual.	Ryan served only as individual.
No *ad testificandum* clause.	*Ad testificandum* clause included.
Wilson president of corporation.	Ryan no representative.
Records held in official capacity.	Records held in personal capacity.
Wilson, as officer, held in contempt for preventing corporate compliance with subpoena.	Ryan punished for personally failing to produce the documents.

Heretofore the Supreme Court of Illinois has held in *People* v. *Zazove,* 311 Ill. 198 (1924), that papers in the sole possession of the defendant, although not made by him, nor belonging to him, were under the protection of the constitutional guaranty.

In the instant case the holding is to the contrary, on the authority (as it is stated) of the ***Wilson*** case.

The question presented is of importance and arises almost daily in the administration of the criminal laws by the various States, and by the United States; and involves the constitutional guaranties against self-incrimination of witnesses subpoenaed to produce incriminating documents and effects before grand juries and courts.

The instant case appears for the first time to present the question wherein the witness served with a subpoena ***duces tecum*** did not have possession of the demanded documents as a corporate official but solely in a personal capacity.

The dissenting opinion in analyzing the doctrine of the ***Wilson*** case concludes (R. 36), that "The decision in the ***Wilson*** case was based upon the corporation's duty to produce its records or books, and emphasis was placed upon the facts that at all times Wilson was subject to the direction of the corporation and that the books were under its control." (And (R. 37), "If control by the corporation is the reason for denying a person the protection he would otherwise have against being compelled to produce documents in his possession which would incriminate him, it becomes highly important to inquire into the existence and extent of such control in the particular case." * * * "If the rule of the *Wilson* case is to be extended to one who is neither an officer nor a general agent of the corporation, * * * the decision should be supported by convincing reasoning and accurate analysis."

IV.

The decision of the State Supreme Court in the instant case is directly in conflict with the doctrine of *Bowman Dairy Company* v. *United States,* 341 U. S. 214, decided in 1951 in a contempt proceeding, that a subpoena containing a *duces tecum* clause which is bad in part is bad in its entirety; that the burden is upon the court to see that the subpoena is good in its entirety, and that it is not upon the person who faces punishment to cull the good from the bad.

The record presents three separate and distinct points wherein the decision of the instant case conflicts with said doctrine.

(a) In the opinion of the State court it is held in the instant case that the general language in the subpoena, similar to that described in the opinion of the *Bowman Dairy Company* case as a "catch-all" phrase, is clearly surplusage; and that the inclusion of an improper item in a subpoena *duces tecum* does not result in total invalidity so that a witness thereby escapes the obligation of complying with any portion of it (R. 29).

The decision is directly in conflict with *Bowman Dairy Company* v. *United States,* 341 U. S. 214, 221, decided in 1951 in a contempt proceeding, wherein it was held that a similar phrase in a subpoena *duces tecum* is invalid, and renders the subpoena bad in its entirety; that the burden is upon the court to see that the subpoena is good in its entirety, and it is not upon the person who faces punishment to cull the good from the bad.

The "catch-all" phrase contained in the subpoena involved in the instant case, following the enumeration of substantially all the books and records of Tam O'Shanter

Country Club, a corporation, for a period of eighteen months, reads:

> "together with all copies, drafts and vouchers relating to said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said matter." (R. 2, 4, 12-13, 22-23).

The authorities cited in the opinion of the State court in support of its holding, do not any of them involve a subpoena *duces tecum*. Those authorities involved appealable orders of court entered, usually in receivership proceedings, wherein the propriety of the orders entered was not challenged by review, and in contempt proceedings for refusal to obey the orders, the attack thereon was collateral.

The authorities cited, and the holding of the State court in the instant case, are directly in conflict with the doctrine announced and applied in the following cases, wherein it was held that when an order is entered for the production as evidence of books, records and documents, if the party against whom the order is made wishes to contest the validity of the order he may refuse to obey and in a prosecution for contempt show in defense that the court had no authority to make the order.

Lester v. *Berkowitz,* 125 Ill. 307, 308 (1888).
Lester v. *People,* 150 Ill. 408, 416 (1894).
Carden v. *Ensminger,* 329 Ill. 612, 620 (1928).

The statement in the opinion (R. 29), that "There was no challenge directed to this printed portion of the subpoena in the trial court," is contrary to the record (R. 13, 14, 15, 16).

With respect to the proposition herein presented, this is not an isolated case. The "catch-all" phrase has been,

and is now being, incorporated in every subpoena *duces tecum* issued by the Criminal Court of Cook County. It has been printed into the subpoena as a standard clause (R. 29). It is in general use in state courts throughout the country. The opinion of the State court in the instant case points out that the doctrine of the *Bowman Dairy Company* case (341 U. S. 214, 221) may be disregarded and ignored, insofar as the State of Illinois is concerned.

(b) Regarding the contention of petitioner, that the subpoena is so broad in scope as to amount to an unreasonable search and seizure, it is held in the opinion that the instant case is governed by *People* v. *Allen,* No. 31947, decided the same day (410 Ill. 508), and that the demand is not unreasonable in view of the subject under investigation (R. 27-28).

The decision is directly in conflict with *Hale* v. *Henkel,* 201 U. S. 43, 71, 76, 77 (1905); *Boyd* v. *United States,* 116 U. S. 616, 622 (1886); and *People* v. *Reynolds,* 350 Ill. 11, 20 (1932); all of which cases involved subpoenas *duces tecum;* and the decision is also in conflict with the principle announced and applied in the cases of *Lester* v. *People,* 150 Ill. 408, 416 (1894) and *Carden* v. *Ensminger,* 329 Ill. 612, 620 (1928).

The language of the dissenting opinion in the instant case is apropos (R. 33-34): that the subpoena *duces tecum* in the scope of its demand "is unreasonable and constitutes a flagrant abuse of the judicial process. See *Hale* v. *Henkel,* 201 U. S. 43."

(c) Petitioner contends that said subpoena having an *ad testificandum* clause, as well as a *duces tecum* clause, in a grand jury matter charging petitioner with specific criminal offenses, wherein the Constitution and Statute of the State of Illinois forbid his being called as a witness

against himself, the inclusion of the *ad testificandum* clause therein rendered the subpoena bad in its entirety, under the doctrine of the *Bowman Dairy Company* case.

We have been unable to find any case wherein the above proposition had been presented to, or passed upon by, any Federal or State court of review.

Prior to the issuance of the subpoena, petitioner had been charged upon the docket of said grand jury with the violation of specific sections of the Criminal Code of Illinois (R. 9, 15).

Under the common law petitioner was an incompetent witness in a criminal matter wherein he was the named defendant charged with offenses. The Constitution of Illinois guaranteed him immunity from being compelled to testify (Const. of Ill., Art. II, Sec. 10). The Statute of Illinois, in partially removing the common law incompetency, provided that he could be called as a witness, but only at his own request (Ill. Rev. Stat. (1951), Chap. 38, Par. 734). He made no request to be called in said matter.

The decision in the instant case is directly in conflict with *Boone* v. *People,* 148 Ill. 440, 448 decided in 1894, announcing the doctrine that,

> "The provision of the statute and the positive inhibition of the constitution alike preclude the right of the grand jury, or any court, to call upon the defendant, and, in the first place make him a witness, and require him to give evidence against himself."

The same doctrine has been recognized and applied in:

State v. *Gardiner,* 88 Minn. 130; 92 N.W. 529, 533.

People v. *Bermel,* 128 New York Supp. 524, 525, 526.

People v. *Gillette,* 126 App. Div. (N. Y.) 665, 667, 668, 670.

State v. *Naughton,* 120 S.W. Rep. 53, 64; 221 Mo. 398.

United States v. *Edgerton,* 80 Fed. Rep. 374, 375, 376.

The decision of the instant case is in conflict with the principle of *Bowman Dairy Company* v. *United States,* 341 U. S. 214, 221, decided in 1951, that a subpoena bad in part is bad in its entirety.

In the opinion of the instant case, however, the Supreme Court of Illinois seeks to distinguish the application of the *Bowman Dairy Co.* case by stating that it is important to note that the offending clause in that case survived a motion to quash in the trial court (R. 29), and that a witness faced with a subpoena *duces tecum* which he believes to be invalid in whole or in part has the opportunity to appear before the court which issued it and move that it be quashed, vacated, or amended (R. 30).

There is a sharp and clear distinction between, "Being called as a witness where the examination is directed against the acts of others, * * * and being called as a witness where the proceeding is directed against the witness himself." In the latter case there is no power to administer the oath. It has been so held in the case of *People* v. *Gillette,* 126 App. Div. (N. Y.) 665, 668, wherein it is further stated (p. 670):

> "A person against whom the inquiry of the grand jury is directed should not be required to attend before that body, much less be sworn by it."

The Supreme Court of Illinois refused to apply this doctrine, because they had disregarded the basic undisputed fact in the record from which it springs, that petitioner was himself under investigation by that grand jury. In the instant case the subpoena as to the petitioner was

void and lifeless *ab initio,* and thereafter no act or omission of his could give it vitality.

The point that a forbidden *ad testificandum* clause in a subpoena renders the entire subpoena invalid, was not presented, and was not involved in *Wilson* v. *United States,* 221 U. S. 361; *Wheeler* v. *United States,* 226 U. S. 478; *Esgee Co.* v. *United States,* 262 U. S. 151; *United States* v. *White,* 322 U. S. 694, and other similar cases, cited by the Supreme Court of Illinois in support of the judgment, because in those cases the subpoenaes did not contain *ad testificandum* clauses. Neither did the subpoena in the *Bowman Dairy Company* case contain an *ad testificandum* clause. Likewise the point was not involved in *Hale* v. *Henkel,* 201 U. S. 43, and cases of that type, because there the witness was protected by an immunity statute, and a valid subpoena could issue for him to testify. In Illinois there is no applicable immunity statute.

Petitioner contends that the decision in the instant case is erroneous, and that it should be governed by the doctrine of the *Bowman Dairy Company* case. The doctrine there announced establishes a uniform principle of law applicable to proceedings in Federal and State courts throughout the nation; and this Court is asked to decide whether the uniformity of that principle may be destroyed by a State court of review.

CONCLUSION.

Petitioner prays that for the foregoing reasons, this petition for a Writ of Certiorari be granted.

Respectfully submitted,

RALPH S. MCFARLAND,
C. VERNON THOMPSON,
Counsel for Petitioner.

April 9, 1952.

APPENDIX A.

Constitution of the United States:

Amendent IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. * * * Nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Amendment XIV, Sec. 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Illinois:

Art. II, Sec. 2. No person shall be deprived of life, liberty or property, without due process of law.

Art. II, Sec. 6. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

Art. II, Sec. 10. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Statutes:

Ill. Rev. Stat. (1951), Chap. 38, Par. 341:

That whoever, in any room, saloon, inn, tavern, shed, booth or building or enclosure or in any part thereof operates, keeps, owns, rents or uses any clock, joker, tape or slot machine or any other device upon which money is staked or hazarded or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost, shall upon conviction for the first offense be fined not less than one hundred ($100) dollars, and for a second offense be fined not less than five hundred ($500) dollars and be confined in the county jail for not less than six (6) months, and for a third offense shall be fined not less than five hundred ($500) dollars and be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years.

Ill. Rev. Stat. (1951), Chap. 38, Par. 343:

Every owner, occupant, lessee, mortgagee or other person in possession of any premises upon which any gambling device may be located and every person in the use, operation, lease or other possession of the same shall be fined for the first offense not less than one hundred ($100) dollars, and for the second offense shall be fined not less than five hundred ($500) dollars and shall be confined in the county jail not less than six (6) months, and for the third offense shall be fined not less than five hun-

dred ($500) dollars and shall be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years.

Ill. Rev. Stat. (1951), Chap. 38, Par. 734:

No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, * * * Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, * * *

APPENDIX B.

STATEMENT.

July 14, 1950, in a matter entitled People of the State of Illinois v. James Ryan, known as Grand Jury Docket No. 96, petitioner was charged upon the docket of the Cook County, Illinois, grand jury with violations of two specified sections of the Criminal Code (R. 9, 15).

A statute of Illinois prohibited the calling of any person charged with crime as a witness in any criminal proceedings except at his own request (Ill. Rev. Stat. (1951), Chap. 38, Par. 734).

Petitioner did not request that he be called as a witness in said matter.

July 19, 1950, the State's Attorney presented to the Chief Justice of the Criminal Court of Cook County a verified petition, entitled People of the State of Illinois v. George S. May, requesting the entry of an order for the issuance of a subpoena commanding Tam O'Shanter Country Club, and Wilfred A. Weismann, Secretary, to attend before said grand jury and to testify and give evidence in said Grand Jury No. 96, and then and there to produce certain enumerated books, records and documents, to-wit:

(a) All records showing cash receipts of Tam O'Shanter Country Club for period of January 5, 1949, to July 5, 1950.

(b) All records showing cash disbursements of Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950.

(c) All records showing cash receipts received by Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950, from operation of Coin Machines, including Slot Machines and Gambling Games.

(d) General Ledger of Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950.

(e) All records showing Accounts Receivable and Accounts Payable of Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950.

(f) All records showing accounts of each member belonging to Tam O'Shanter Country Club for the last three years. (R. 1-2)

July 19, 1950, an order was entered in the Criminal Court directing the issuance of a subpoena to Tam O'Shanter Country Club and Wilfred A. Weismann, Secretary, as prayed for in the foregoing petition (R. 3).

July 27, 1950, there was filed in the Clerk's Office of the Criminal Court of Cook County a printed and typewritten subpoena bearing date July 19, 1950, addressed to Tam O'Shanter Club and Wilfred A. Weismann, Secretary, (and written in longhand) "*and James Ryan Niles Township Cook Co., Ill.,*" containing, an *ad testificandum* clause and a *duces tecum* clause, commanding them to appear before the Cook County grand jury forthwith and to testify and give evidence concerning "a certain complaint made before said Grand Jury against George S. May," and to bring the books, records and documents specified in the petition above, "together with all copies, drafts and vouchers relating to said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said matter," on the reverse side of which subpoena appears

the following return: "Returned, served by reading to the within named James Ryan this 21st day of July, 1950. Sergt. W. Rusin, S. A. O." (Rec. 4).

July 27, 1950, an order was entered for an attachment of the body of James Ryan (R. 5), which the Sheriff returned that he executed said writ by arresting said James Ryan and bringing his body into court August 1, 1950 (R. 6).

August 2, 1950, the sheriff of Cook County forcibly took James Ryan before the grand jury.

August 3, 1950, the State's Attorney presented to the Chief Justice of the Criminal Court a verified information by the foreman of said grand jury, in which he alleged the entry on July 4, 1950 upon the docket of said grand jury as docket No. 96, the matter entitled People of the State of Illinois vs. James Ryan, charging said Ryan with the violation of two specified sections of the Criminal Code of Illinois; the issuance of the subpoena for James Ryan, (R. 8-9); how the books and records demanded would incriminate James Ryan (R. 10); and praying for a Rule upon James Ryan to show cause why he should not be held in contempt of court for his failure to produce said books and records (R. 10-11).

August 3, 1950, an order was entered in said court that James Ryan show cause why he should not be punished for contempt of court for having failed to produce before the court and the July, 1950 grand jury, the books and records of Tam O'Shanter Country Club, a corporation, as set forth in the subpoena *duces tecum,* the answer to be filed on or before August 22, 1950, and the hearing set for August 24, 1950 (R. 11).

August 21, 1950, defendant filed his sworn answer to the Rule to Show Cause, stating the service upon him of the

subpoena on July 21, 1950; that he was not served with any subpoena at any other time, describing the subpoena as containing an *ad testificandum* clause and a *duces tecum* clause (R. 11-13). The answer further stated that on July 24, 1950, by resolution of the Board of Directors of Tam O'Shanter Country Club, a corporation, he was authorized as attorney-in-fact, for and on behalf of said corporation, to execute such petitions, answers, motions, affidavits, notices or other documents as may be desirable or necessary to fully and effectually preserve, protect and enforce the rights of said corporation as guaranteed by the Constitutions of the United States and the State of Illinois, in connection with any proceeding, investigation or inquiry pending before the Grand Jury, the Criminal Court, or before any Judge, Justice of the Peace or Police Magistrate; and to have access to and to affix the corporate seal of said corporation to any document where required (R. 13).

In the answer the defendant further said that he refuses to produce the records and books of account as commanded in said subpoena, because the petition for the issuance of said subpoena is insufficient to give the court jurisdiction to enter the order; that the order directing the subpoena to issue is illegal and void; that the subpoena is illegal and void; that the service of said subpoena was irregular and void; that all proceedings upon which said subpoena is predicated, and said subpoena are in violation of the constitutional rights of respondent as guaranteed by the Fourth Amendment to the Constitution of the United States, Section 6 of Article II of the Constitution of Illinois; and the forced production of said books and records as demanded would deprive respondent of liberty and property without due process of law, contrary to the provisions of Section 1 of the Fourteenth

Amendment to the Constitution of the United States, and Section 2 of Article II of the Constitution of Illinois (R. 13-14).

Respondent further answered that to compel him to answer questions before the grand jury and the court, in said criminal proceeding, which might incriminate him, or to produce said books and records as demanded by said subpoena would violate the constitutional rights of respondent as guaranteed by the United States Constitution and the Constitution of Illinois (R. 14).

The answer then sets forth the contents of the verified petition of the foreman of said grand jury; that he had been charged upon the grand jury docket with violations of the criminal laws of Illinois; the statements in said petition of the foreman of said grand jury wherein he says that said books and records would incriminate respondent (R. 14-15).

The respondent in his answer further aserted that he was not then, nor had he ever been a member, or an officer, director or official of the Tam O'Shanter Country Club, a corporation; but that he had the sole and exclusive possession of the records and books of account demanded and specified in said subpoena; that no other person had access to or knowledge as to the location of said records and books; that said books and records contain entries made by respondent in his own handwriting; and that the statements contained in said verified petition of the foreman of said grand jury, as in the preceding paragraph set forth, together with other statements contained in said petition, lead to the conclusion and respondent therefore believed and asserted that said books and records demanded in said subpoena contain matters which if produced would tend to incriminate respondent, and that

the forced production of said books and records by respondent, in said criminal proceeding, as demanded, would be compelling respondent to give evidence against himself in a criminal proceeding in violation of his constitutional rights as guaranteed by Section 10 of Article II of the Constitution of Illinois, and the Fifth Amendment to the Constitution of the United States (R. 15-16).

Respondent prays that he may be purged of contempt and the Rule to Show Cause be discharged. (Rec. 16). Attached to said answer is a copy of the resolution of the Board of Directors of said corporation, adopted July 24, 1950. (R. 16-17).

August 25, 1950, the judgment was entered in the Criminal Court stating that the court considered the information of Garner Williams, foreman of the July 1950 grand jury, the rule to show cause entered August 3, 1950, the sworn written answer of the respondent, James Ryan, and the argument of counsel, and then found (1) that there was pending before the July 1950 Cook County grand jury a certain investigation known as Grand Jury Docket No. 96; (2) that a subpoena was issued by order of the Criminal Court directing the production of certain books and records of Tam O'Shanter Country Club, a corporation, and the truth to speak, before the *said grand jury;* (3) that James Ryan failed, neglected and refused to produce before the *said grand jury* the books and records of said corporation, as specifically designated in said subpoena; (4) and on August 2, 1950, appeared before this court and failed, neglected, and refused to produce before the *said grand jury* the said books and records, as specifically designated in said subpoena; (5) and on August 24, 1950, appeared before this court and still persisted in his failure, neglect and refusal to produce before

the *said grand jury* the said books and records, specifically designated in said subpoena; (6) that said neglect, failure and refusal to comply with the said subpoena was and is a wilful disobedience and defiance of the *process* of this court; (7) that by reason of said conduct of said defendant, James Ryan, said defendant is guilty of contempt of this court (R. 17, 18, 19).

It is therefore considered, ordered and adjudged that said defendant, James Ryan, because of said contempt of this court as aforesaid be and he is hereby committed to the common jail of Cook County, Illinois, there to remain until said defendant James Ryan shall comply with the order of this court by producing the books and records of the said corporation, Tam O'Shanter Country Club, a corporation, as specifically designated in the subpoena, or until he is otherwise discharged by due process of law. (R. 19).

Defendant objected to the entry of said order and judgment, and moved to vacate and set it aside, which motion was overruled (R. 20).

The Supreme Court of Illinois affirmed the judgment (R. 39) November 27, 1951, and filed the opinion of the court (R. 22-32), and Mr. Justice Crampton rendered a dissenting opinion (R. 32-38).

December 21, 1951, petitioner filed a petition for rehearing (R. 40), setting forth facts that were omitted from the opinion (R. 41-46), among which are (1) that on July 14, 1950, James Ryan was formally charged upon the docket of the July 1950 grand jury with violations of specified sections of the Criminal Code, under Grand Jury Docket No. 96 (R. 43-44), (2) that it nowhere appears in the record that James Ryan requested a subpoena to be issued for him, or that he be made a witness

before said grand jury (R. 41), (3) that James Ryan was forcibly taken before said grand jury by the sheriff under a writ of attachment (R. 43), (4) that the corporation, Tam O'Shanter Country Club, was never served with the subpoena; that no return was ever made that the subpoena had been served upon the corporation, nor upon any officer of the corporation as such, nor upon any person other than James Ryan (R. 45-46); and that the omission to state or consider those and other facts renders the judgment of the Criminal Court, and its affirmance, a violation of the due process clauses of Article II, Section 2, of the Constitution of Illinois, and the Fifth Amendment, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 43).

The petition for rehearing also sets out several instances where facts have been misstated in the opinion, among which are, (1) that the defendant in his answer admitted that he was the attorney in fact of the corporation, and in this capacity had the sole and exclusive possession of the records demanded (R. 47), and that said statement is not true; (2) the mixed conclusion of fact and law, that as a corporate agent having possession and control of its records, defendant was amenable to the subpoena directed to the corporation, (R. 47) is a misstatement of fact intermingled with a conclusion drawn therefrom; as also the remaining statement of that paragraph (410 Ill. 493-494).

In said petition for rehearing it is also pointed out wherein the Supreme Court of Illinois erred in conclusions of fact and law (R. 48-67).

After pointing out the omissions, misstatements, and erroneous conclusions in the opinion of the Supreme Court of Illinois, the dissenting Justice concludes:

"Until now this court has jealously enforced the principles of freedom implicit in the prohibition of unreasonable searches and seizures. Its safeguards should not now be impaired by interpretations which fail to recognize its underlying purpose or by casual and uncritical use of facts. * * * The present decision gives the sanction of this court to methods which we have condemned in the past, and which I regard as still offensive to our fundamental conceptions of justice". (R. 38).

End